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FILED
JUN 19 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1652

In the Supreme Court of the United States

October Term, 1982

LAWRENCE GOLDSTEIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

1. INTRODUCTION 1
2. THE JURISDICTIONAL "QUESTION" 1
3. FACTUAL INACCURACIES IN THE BRIEF IN OPPOSITION 3
4. CONCLUSION 4

TABLE OF AUTHORITIES

Cases

Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) 2
Department of Banking v. Pink, 317 U.S. 264 (1942) 2
Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 2

Statutes

18 U.S.C. Section 1001 3
18 U.S.C. Section 1341 3

Rules

Federal Rule of Appellate Procedure 35(c) 2
Supreme Court Rule 20.1 1
Supreme Court Rule 20.4 ..... 1, 2

Text

Stern and Gressman, *Supreme Court Practice*, p. 399 (5th Ed. 1978) 2

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1. INTRODUCTION

Petitioner does not believe that he needs to respond to every point raised in the Brief for the United States in Opposition, as those matters were adequately covered in Petitioner's Petition for Writ of Certiorari to the Court. However, there are certain matters raised in the Brief for the United States in Opposition which Petitioner feels should be responded to.

2. THE JURISDICTIONAL "QUESTION"

The Solicitor General asserts that the Petition for Certiorari was untimely under Rule 20.1. The Solicitor General's position in this regard is totally frivolous. The record before this Court shows that Petitioner's Motion for Rehearing En Banc was denied on February 18, 1983 by the United States Court of Appeals for the Tenth Circuit. Rule 20.4 of this Court's rules expressly provides that ". . . if a

petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties . . . runs from the date of the denial of rehearing . . .". This rule follows the cases decided by this Court. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 149-150, n. 24 (1980); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-46 (1974); *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942). The Solicitor General has confused the finality mentioned in Federal Rule of Appellate Procedure 35(c) with the finality mentioned in Rule 20.4. As Stern and Gressman have stated:

> "By thus suspending the finality of the lower court's judgment, the filing and pendency of a timely petition for rehearing also render premature the filing of a petition for certiorari in the Supreme Court prior to final action below on the petition for rehearing . . . . In this context, finality relates not to the final or interlocutory nature of the judgment on the merits, but to the finality of the action being taken by the lower court. If a rehearing is sought in the court below, there is no absolute certainty that the judgment below will not be altered. Only when there is such certainty can the judgment properly be made the subject of a petition for certiorari. And thus it is that the time for petitioning for certiorari commences on the date when certainty and finality attach to the action taken by the lower court. Where rehearing has been sought, that date is the one on which the hearing was denied."

Stern and Gressman, *Supreme Court Practice*, p. 399 (5th Ed. 1978).

3. FACTUAL INACCURACIES IN THE BRIEF IN OPPOSITION

Solicitor General, at page 5 of its Brief in Opposition, states that the alleged scheme to defraud in this case had at its heart the commission of a violation of 18 U.S.C. Section 1001. The Solicitor General has misread the record. The information in this case charged a violation of 18 U.S.C. Section 1341 in Counts I through X. Only Counts XI-XIV charged a violation of 18 U.S.C. Section 1001. It was not the government's theory in the trial court as to Counts I through X that Petitioner and his co-defendants had in fact violated 18 U.S.C. Section 1001.

The Solicitor General also has misread the record when he makes the statement that the claim forms submitted by Petitioner's pharmacy were clearly false under the Kansas Medicare Act and regulations issued thereunder because they listed that pharmacy as the provider of services actually provided at the Central Clinic. Brief in Opposition at pp. 4-6, 8. The record is abundantly clear that neither the claim forms, nor the regulations issued under the Kansas Medicare/Medicaid Program, required that the "provider number" listed on the claim form was the place where the drugs were dispensed. The government's trial attorney in fact admitted this to the trial court. *Pet. for Cert.*, p. 7, FN 5; p. 22. In fact, the Court of Appeals in this case did not hold that the regulations or claim forms submitted were literally untrue; the court merely held that the Kansas Medicaid laws and regulations provided guidelines "under which defendants should have known what material facts they had a *duty to disclose* in claiming Medicaid reimbursements." *Pet. for Cert.*, at p. A-13, emphasis added. The Brief in Opposition at pp. 4-5 clearly misstates the record—and the holding of the Court of Appeals—when it states that this is not a fiduciary duty

to disclose case. In this respect, the most glaring misstatement of fact in the Brief in Opposition appears at p. 8, where it is asserted that the Kansas regulations specifically prohibited the conduct of defendant. It was not until *1979*—after the period mentioned in the indictment—that the regulations were amended to require specifically that "provider number" meant the place where the drugs were dispensed. *Pet. for Cert.*, at p. 7.

4. CONCLUSION

For the reasons set out herein and in Petitioner's Petition for Certiorari, his Petition for Certiorari should be granted.

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